1983

State of Utah v. Ronald Dale Easthope : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent	:	
v.	:	
RONALD DALE EASTHOPE, Defendant-Appellant	:	Case No. 18310

BRIEF OF APPELLANT

Appeal from a jury verdict convicting the appellant of Aggravated Sexual Assault, a first degree felony, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder, Judge, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for Aggravated Sexual Assault, a First Degree Felony, in violation of Utah Code Ann. §76-5-405 (1953 as amended), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Ronald Dale Easthope, was charged by Information with Aggravated Sexual Assault, a First Degree Felony, in violation of Utah Code Ann. §76-5-405 (1953 as amended). On February 8, 1982, the appellant was convicted by a jury as charged, and on February 17, 1982, was sentenced to incarceration in the Utah State Prison for the indeterminate term of five years to life.

RELIEF SOUGHT ON APPEAL

The appellant, Ronald Dale Easthope, seeks reversal of the judgment entered against him and a new trial in the court below.

STATEMENT OF THE FACTS

In the early morning hours of September 19, 1981, in a basement apartment at 1010 Downington Street, Salt Lake City, Utah, Hazel Jensen was raped at knifepoint by a person she described as wearing a pillow case mask, a levi jacket, white tennis shoes with blue stripes, and red and white gloves. (T. 39-40, 43-44, 48-49) Ms. Jensen never saw her assailant's face and was consequently unable to directly identify anyone as the rapist, but did give a description which generally matched the appellant's size and build. (T. 46-47)

After the appellant's arrest, the State filed a motion in the Fifth Circuit Court requesting hair samples and body fluids from the appellant. (T. Dec. 4, p. 3) The motion was granted, allowing hair samples and blood to be taken from the appellant, which were later used at trial against the appellant over defense counsel's objections. (T. 324-25)

Before the trial, defense counsel made a motion to sequester the jury, in order to prevent exposure of the jury to possible media coverage of the trial. (T. 3) This motion was renewed during the trial after counsel had observed news reports of the case which highlighted and drew attention to the court's

gag order, on the grounds that anyone viewing or hearing of the news reports would at least wonder what the appellant had to hide. Defense counsel also moved the court to ask the jurors individually if any of them had seen or heard news reports of publicity of the case. Both motions were denied. (T. 120-21)

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE BLOOD AND HAIR SAMPLES TAKEN FROM THE APPELLANT TO BE USED IN EVIDENCE AGAINST HIM.

While the appellant was in custody and under arrest, but before the preliminary hearing and before the appellant had been bound over for trial, the State filed its motion to compel discovery in the Fifth Circuit Court. The motion was granted by that court over defense counsel's objection, pursuant to which the samples of blood and hair were taken.

However, the Fifth Circuit Court exceeded the scope of its authority in granting a discovery motion in this instance. This conclusion follows from the holding of this Court in Van Dam v. Morris, 571, P.2d 1325 (Utah 1977),[1] and that court's analysis of the statutory scheme. Although both the Code of Criminal Procedure and the Court system in Utah have been revised

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1. All statutory references are to Utah Code Ann. (1953 as amended), unless otherwise stated.

since the Van Dam decision, both the pertinent language of the new Code provisions and the new court structure are in all material respects the same as the analogous provisions discussed in Van Dam.

In Van Dam, this Court held that a city court judge (analogous to today's circuit court judge) presiding at a preliminary hearing on a felony case "does not sit as a judge of a court and exercises none of the powers of a judge in a court proceeding, except as they inhere in the office of magistrate".[2] The court then pointed out that a magistrate derives his power entirely from statute, and that the power conferred upon a magistrate conducting a preliminary hearing by the then existing statutes was "limited to discharging the defendant (77-15-17) or holding him for proceedings in the district court (77-15-19)."[3] The court then concluded that the powers granted to "the court" to dismiss an action (by then sections 77-51-1 through 4) were not held by a city judge while acting as a magistrate conducting a preliminary hearing, although the same judge did have the power to dismiss if sitting as a trial judge.

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2. 571 P.2d at 1327

3. Id.

The present statutory scheme, which created the circuit courts in place of the old city courts, retains essentially the same procedural structure. Section 78-4-5 grants to the judge of the circuit court "the powers and jurisdiction of a magistrate, including proceedings for the preliminary examination to determine probable cause. . . ." Rule 7(d) of the Utah Rules of Criminal Procedure expounds upon the powers of the magistrate in conducting the preliminary hearing, giving him the power to bind over a defendant to district court upon a finding of probable cause. Rule 7(d)(1) then specifically provides that: "Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination." Thus, the magistrate is statutorily denied the power to decide questions of the admissibility or inadmissibility of evidence, on either constitutional or statutory grounds.

Rule 16 of the Rules of Criminal Procedure deals with discovery in criminal cases. Throughout the entire provision various grants of power are made to "the court" to decide which items shall be discoverable. Subsection (g) gives to "the court" the power to impose sanctions for the failure to comply with the rule. Nowhere in the rule is a magistrate given any power concerning discovery. The fair import of the language of Rule 16 evidence a legislative intent that the discovery process be under the direction of "the court" having jurisdiction to try the case, and not the magistrate who merely conducts the probable cause hearing. This intent is particularly highlighted

by the specific prohibition of Rule 7(d) mentioned above, which, when coupled with the provision allowing hearsay evidence at preliminary hearings, evidences a legislative intent to avoid potentially unnecessary disputes over the admissibility of evidence before it has ever been determined whether or not the trial itself is necessary.

This analysis is identical to that used by the Van Dam court. If the magistrate conducting the preliminary hearing has no power to dismiss the case because the powers of the magistrate exist only as created by statute, and the statute gives the power to dismiss only to "the court", the same reasoning should apply to the power to compel discovery; since the statute only gives that power to "the court", the magistrate simply has no power to compel discovery.

Indeed, this was the conclusion reached by Judge Dean E. Conder of the Third District Court in his Memorandum Decision in Cannon v. Keller, Miscellaneous No. M-80-88 (December 15, 1980), where he faced precisely the issue now under discussion. Granting the petitioner's Writ of Mandamus directing the circuit court judge to declare null and void his previous order compelling discovery, Judge Conder reasoned that the jurisdiction of a circuit court judge conducting a preliminary hearing for a felony case is limited to that of a magistrate. Since, at common law, no right to discovery existed, any such right must necessarily arise by statute or constitution. The constitution being silent, and the statute failing to grant power to a magistrate to compel

discovery, the circuit court was held to lack jurisdiction to issue the order of discovery in that case.

The same result should follow in the present case. The appellant was unlawfully compelled to submit to the sampling of his blood and hair, and the evidence obtained therefrom is inadmissible. The use of inadmissible evidence denied the appellant his right to a fair trial and due process of law, was prejudicial because of the damning nature of the tests performed on those samples, and requires a reversal of the conviction rendered below.

POINT A

THE TAKING OF THE APPELLANT'S BLOOD SAMPLE WAS AN UNCONSTITUTIONAL SEARCH AND SEIZURE.

Should this court agree that the circuit court was without jurisdiction to issue the motion compelling discovery in this case, then the hair and blood samples taken from the appellant were obtained without a valid search warrant, since no warrant was issued in the present case. And while the taking of the appellant's hair sample may have constituted such a slight intrusion into the body of the appellant that it was constitutionally permissible even absent a search warrant,[4] the same cannot

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4. See State v. McCumber, 622 P.2d 353, 358 (Utah 1980)

be said of the blood sample. This was made clear by the United States Supreme Court in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966).

Schmerber was an appeal from a conviction for driving an automobile while under the influence of intoxicating liquor. The defendant was arrested at the hospital where he was being treated for injuries sustained in an accident. Against his will a blood sample was taken at that time and later introduced at trial as evidence of the defendant's intoxication.

On appeal it was argued that admission of this evidence violated several of the defendant's constitutional rights. Although his conviction was upheld, the Supreme Court decided clearly for the first time that the law of search and seizure applies to body examinations for physical evidence. Most significantly, the court held that no physical evidence could be seized unless investigators first obtained a warrant or the facts of the situation justified a warrantless search under one of the traditional exceptions to the warrant requirement.

The Court noted that, although this search of the defendant's body was conducted after his arrest, that fact alone could not purify a warrantless intrusion into his body. Whatever justification exists for a search pursuant to arrest do not apply to this sort of body search, the court added. 384 U.S. at 772.

The court held that because the evidence of alcohol in the arrested person's blood was diminishing and would soon be eliminted altogether, its seizure fell under the traditional exception to the warrant requirement in emergency situations.

However, the court made clear that its holding was not to be interpreted too broadly:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions. Id.

The United States Supreme Court reiterated this principal in the subsequent case of Cupp v. Murphey, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed. 2d 900 (1973). In that case the defendant appeled from his conviction of the murder of his wife on the grounds that scrapings from under his fingernails were improperly seized and used as evidence against him.

In Cupp the defendant voluntarily appeared at the station house for questioning about his wife's murder. Investigators interrogating him noticed a dark spot under one of his fingernails, and realizing its potential relevance to the victim's death by strangulation, sought to examine the defendant's hands. When asked about the dark spots, he began to scrape at them himself, and at this time the defendant was subjected to a forcible examination of his nails. Thread from the victim's night gown and blood her type were found.

The Supreme Court held that this search was not unreasonable despite the fact that the defendant had not been arrested or served with a warrant. The court's decision was based upon the emergency situation which existed where relevant evidence was about to be destroyed:

> "The rationale of Chimel, in the circumstances, justified the policy in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails." (Emphasis Supplied). 412 U.S. at 296

In the instant case the defendant did not consent to the search of his body and the seizure of blood and hair samples. No emergency existed which justified this search without a warrant; there was no possibility of the evidence sought being destroyed through natural processes or by the defendant himself. Under Schmerber the defendant's Fourth Amendment rights were violated and his blood samples were improperly admitted into evidence.

These standards are clearly applicable in State court proceedings as illustrated by the recent California case of People v. Bracamonte, 15 Cal. 3d 394, 540 P.2d 624 (1975). The defendant was suspected of having swallowed several balloons of heroin to avoid their discovery when searched by police. She was forcibly administered an emitic which caused her to vomit and give up the balloons of heroin as expected.

Although the defendant was searched pursuant to a warrant which authorized examination of her person and effects, the California Court held that its coverage did not extend to physical evidence. And since no emergency existed which justified a warrantless search of her body, the evidence was held to have been improperly seized.

The Colorado Court has applied Schmerber in the same manner holding the withdrawal of a blood sample against the defendant's will was authorized only because of the emergency exception to the warrant requirement. People v. Smith, 175

Colo. 212, 486 P.2d 8 (1971). See also People v. Sanchez, 476 P.2d 908 (Colo. 1970).

The seizure of the appellant's blood in the present case for mere type testing could have and should have been carried out pursuant to a warrant. The failure to do so resulted in a search and seizure violative of the appellant's Fourth Amendment rights.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO POLL THE JURORS AS TO THEIR POSSIBLE EXPOSURE TO PUBLICITY OF THE TRIAL PROCEEDINGS, AND IN REFUSING TO SEQUESTER THE JURY.

In 1971, the appellant was charged with a series of sexual assaults which occurred in the Sugarhouse area of Salt Lake City. The appellant was convicted on two counts of rape at that time and sentenced to prison. The 1971 trial was surrounded by considerable publicity, and the appellant was labeled by the press as the "sugarhouse rapist". (T. 2-5) Shortly after his parole in 1981, the appellant was charged with the aggravated sexual assault of which he now stands convicted. Surrounding the arrest and the preliminary hearing of this case was a fair amount of press coverage referring to the appellant as the "sugarhouse rapist". Typical headlines were, "Rapist charged again", and "Paroled 'Sugarhouse Rapist' Charged with Sexual Assault."

It was this kind of publicity which caused defense counsel initially to make a motion to have the jury sequestered. (T. 91-92) Since there were no media personnel in the courtroom at the beginning of the trial the motion was denied, with leave to reopen the motion if the situation should change. (T. 3)

By the second morning of trial, the situation had changed: Representatives of the media had arrived; the court had instructed the media not to refer to the appellant as the "Sugarhouse Rapist" or to refer to his prior criminal record (T. 91-92); and both the 6:00 o'clock and the 10:00 o'clock T.V. news on Channel 2 had reported the progress of the trial. Both of those news reports had followed the judge's order, but had stated that the appellant was charged with a rape and that an order was entered which prohibited them from reporting certain things about the appellant that were already of public record. (T. 120-21). At this point, defense counsel renewed the motion to sequester the jury, and further moved to poll the jurors individually as to whether or not they had been exposed to any media coverage. The judge denied both motions, choosing instead to rely on his admonitions to the jury not to see, hear, or read media reports. (T. 120-21).

The right to a fair trial by an impartial jury is protected by both the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 12 of the Utah Constitution. State v. Anderson, 65 Utah 415, 237 P. 941 (1925). This means that the accused has the right to a trial by a jury "free from outside influences", and that the verdict must be based on evidence presented at trial, and not upon evidence from other sources, such as the media. Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966).

With respect to the influence of publicity on the trial of an accused, two rules have been developed by the federal courts. The Supreme Court of Hawaii, in State v. Keliiholokai, 569 P.2d 891 (Ha. 1977), gives an excellent analysis and summary of the case law developing these two rules. The appellant urges this Court to adopt the federal court analysis outlined below. First, where extensive media reporting highly prejudicial to the accused comes to the attention of the jurors during the trial, a clear denial of the right to a fair trial by an impartial jury has occurred, and the conviction will be reversed. Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed. 2d 543 (1965). In Estes, the confusion, distraction, and intensity of public feeling and pressure caused by live T.V. coverage of the proceedings were held to have denied the defendant of his right to a fair trial by an impartial jury, because of the inherent possibility of prejudice.

The second rule, relevant to the instant case, is applicable where the potential of prejudice is not obvious or inherent, and where the extent of the jury's exposure to the media reports is uncertain. In such an instance, where the trial court has been made aware of the media reports, that court must then determine "the extent and effect of the infection, and . . . take appropriate measures to assure a fair trial." United States v. Jones, 542 F.2d 186, 194 (4th Cir. 1976); United States v. Pomponie, 517 F.2d 460, 463 (4th Cir. 1975), cert. den. 423 U.S. 1015, 96 S.Ct. 448, 46 L.Ed. 2d 386 (1975).

This requires a two-step approach. The trial court must first determine whether or not "the nature of the news accounts rises to the level of being substantially prejudicial." Keliiholokai, 569 P.2d at 895. If the news accounts are not substantially prejudicial, the inquiry is at an end and the court need do nothing further. Jones, 542 F.2d at 194. If substantial prejudice is found, however, the court must examine each juror.

> Individually and outside the presence of other jurors to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively that he has read or heard any of the publicity in question the judge is not required to proceed further. Margoles v. United States, 407 F.2d 727, 735 (7th Cir. 1969), cert. den. 396 U.S. 833, 90 S.Ct. 89, 24 L.Ed. 2d 84 (1969); United States v. Jones, 542 F.2d 186, 194 (4th Cir. 1976).

If the trial court fails to make at least an initial inquiry (where media reports are prejudicial), the accused is thereby denied the opportunity to find out whether or not the jurors have been exposed to the reports -- i.e., whether or not the jurors are indeed free from outside influence. Such a failure constitutes reversible error, since the trial court's conduct in such an instance, even where the jurors have been instructed not to see, hear, or read media reports, is not a sufficient protection of the accused's right to a fair trial. Pomponio, 517 F.2d at 460.

Turning to the facts of the present case, on the second day of trial the judge expressly refused to ask the jurors, either collectively or individually, whether or not they had seen or heard any news reports from the night before. In doing so, he stated, "I heard the news report. I don't think that

that was prejudicial". (T. 121) If this court chooses to adopt the federal analysis, the issue then becomes one of whether or not the trial court's "finding" of no prejudice in the news reports was proper. If that finding was proper, the court was correct in not inquiring further. If not, the court's failure to poll the jurors as to their possible exposure to the report failed to assure the appellant of a fair trial, and requires reversal.

As stated above, the appellant's trial and conviction some ten years ago were highly publicized, and the label, "Sugarhouse Rapist", given him by the press, was commonly known. Indeed, the members of this Court themselves were probably familiar with the "Sugarhouse Rapist" even independent of any possible judicial connection with the case. And at the appellant's arrest and preliminary hearing, the media emphatically told the public that the "Sugarhouse Rapist" was again being tried for rape. However, the appellant was not generally known by his real name, which probably accounts for the fact that none of the prospective jurors recognized him at the onset of the trial. (T. 11)

The prejudicial impact on a jury of the prior misdeeds of a criminal defendant has long been recognized by the courts, particularly where the prior conviction is similar to the crime charged. Recognizing this danger, the trial court took some measures to prevent the jury from finding out who the appellant was: All witnesses were to be admonished not to refer to the appellant's prior convictions, they were not to refer to the Sugarhouse area by that name (T. 4), and the news media were

ordered not to refer to the appellant's prior record or to refer to him as the "Sugarhouse Rapist" (T. 91-92). The reasons for these orders was stated by the court:

> I am going to ask both counsel to admonish all witnesses that they make no reference to any prior rapes or convictions of any kind. To try this case strictly on the facts of this particular case. (T. 4)
>
> * * *
>
> I am going to do this, because I think it would be highly prejudicial to refer to him in any news report as the "Sugarhouse Rapist"; I am going to issue an order that none of the news media is to use the term "Sugarhouse Rapist" during the course of the trial, because I think it is highly prejudicial. (T. 91)

Although the trial court intelligently foresaw the explosive potential of prejudice to the appellant, should they jury learn that he was the notorious "Sugarhouse Rapist", the court's solution to the problem was less than adequate. Instead of simply sequestering the jury during the trial (at least after it became apparent that the media were covering and reporting on the trial) as moved by counsel, the court chose to issue a gag order to the media. The gag order was improper for two reasons. First, it constituted a prior restraint on the media's First Amendment Freedom of Speech and Press rights, which restraint would have been unnecessary if the jury were sequestered. Second, the gag order did not adequately assure the appellant of a fair trial, for it left the jury at large during the times court was not in session, where they very likely were exposed to the media reports.

If one or more of the jurors had read or heard the prior news reports referring to the appellant as the "Sugarhouse Rapist", and then heard the news reports during his trial mentioning that some facts about the accused were not being disclosed due to a court order, they may easily have caught the connection, and been reminded of the prior news reports concerning the "Sugarhouse Rapist". Indeed, the very mention of a court order prohibiting disclosure of facts about an accused which are already of public record fairly screams the message that someone has something to hide. Such a report, coupled with the reports at the time of the arrest and preliminary hearing which did call the appellant the "Sugarhouse Rapist", could certainly tip off an interested listener as to who this defendant really was.

As to whether this actually happened in the present case, the appellant has no way of knowing. Such a risk of prejudice could have been avoided, had the trial court either sequestered the jurors, or at least asked them the simple question of whether or not they had been exposed to any on-going publicity concerning the trial.

CONCLUSION

The circuit court was without authority to grant the State's discovery motion compelling the appellant to submit to blood and hair samples. The samples were therefore taken without a valid court order or warrant, and the blood sample was taken in violation of the appellant's Fourth Amendment rights, and should have been suppressed by the trial court. The trial

court further committed prejudicial error in refusing to either sequester the jury or at least poll the jurors as to their possible exposure to the publicity surrounding the trial. The conviction should be reversed, and the case remanded to the Third District Court for a new trial.

DATED this 7 day of December, 1982.

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J. MARK ANDRUS
Attorney for Appellant

DELIVERED a copy of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, this _____ day of December, 1982.